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In the
Supreme Court of the United States

OCTOBER TERM, 19.....

No. 648

KING COUNTY, a legal subdivision of the State of Washington, *Petitioner,*

vs.

TRICON, INC., a corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE FINAL DECREE OF THE SUPREME COURT OF WASHINGTON

WILLIAM L. PAUL, JR.
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PETITION FOR WRIT OF CERTIORARI TO REVIEW THE FINAL DECREE OF THE SUPREME COURT OF WASHINGTON

STATEMENT AS TO JURISDICTION

Petitioner, KING COUNTY, a legal subdivision of the State of Washington, submits herewith its Statement particularly disclosing the basis upon which this Court has jurisdiction to review the judgment of the Supreme Court of Washington in cause No. 36215 affirming the decree of the Superior Court of the State of Washington.

JURISDICTION

1. Opinions Below

The judgment of the trial court is attached hereto as Appendix No. 2. The opinion of the Supreme Court of the State of Washington is attached hereto as Appendix No. 3. It is unofficially reported at 160 Wash. Dec. 398, 374 P.(2d) 174.

2. Statutory Provisions Sustaining Jurisdiction

The statute believed to sustain the jurisdiction of the

Supreme Court of the United States is § 1257 (2) of Title 28 of the United States Code.

3. Statutes of the State Involved

The statutes of the state, the validity of which is involved, are Revised Code of Washington 84.36.005 and 84.40.220 attached as Appendix No. 1.

4. Date of Judgment and Appeal

The opinion and judgment of the Supreme Court of the State of Washington was entered August 16, 1962, and is attached hereto as Appendix No. 3.

5. Cases Believed to Sustain Jurisdiction

The cases believed to sustain the jurisdiction of the Supreme Court of the United States are *Brown v. Maryland*, 25 U.S. 266 (12 Wheaton 419), 6 L.ed. 678 (1827); *Low v. Austin*, 80 U.S. 29 (13 Wallace 29), 20 L.ed. 517 (1871); *Youngstown Sheet & Tube Co. v. Bowers* and *United States Plywood Corp. v. City of Algoma*, decided together and reported in 358 U.S. 534, 3 L.ed.(2d) 490, 79 S.Ct. 383 (1958).

6. Raising the Federal Questions

(a) Questions 1 and 2

Federal questions involving the original package doctrine, namely the effect of Article I, Section 10, Clause 2 of the United States Constitution, upon the general tax laws of the State of Washington, were raised originally in the complaint filed in the Superior Court. Revised Code of Washington 84.36.005 and 84.40.220 are the statutes under which the County Assessor made the assessment and the Treasurer levied the tax in question.

The precise language of the judgment of the trial court is in general terms insofar as the statutes and the United States Constitution are concerned:

> "That the assessment for personal property taxes levied by the Defendant, A. J. 'Tony' Steen, for the year 1960 and the tax levied thereon payable in the year 1961, so far as the same purport to assess and levy a personal property tax against property of the plaintiff herein which is imported and which remains in its original package, be and it hereby is declared to be null and void and of no effect whatsoever."

(b) Question 3

The contention that Article I, Section 10, Clause 2 of the United States Constitution and *Brown v. Maryland, supra,* concern only an excise tax, and not a general property tax, was raised at length on oral argument before the state supreme court.

QUESTIONS PRESENTED

The following questions are presented by this petition:

1. Whether the assessment of the county general property tax on the taxpayer's goods irrevocably dedicated to general sale, authorized by Revised Code of Washington 84.36.005 and 84.40.220 was prohibited by Article I, Section 10, Clause 2 of the United States Constitution and in particular that Clause 2 relating to imposts and duties is controlling of ad valorem general property tax statutes of a state, to the end that RCW 84.36.005 and 84.40.220 are invalid to the extent of assessment of tax on the taxpayer's goods still in the original package.

2. Whether the assessment of the county general property tax on the taxpayer's goods irrevocably dedicated to general sale, authorized and directed by Revised Code of Washington 84.36.005 and 84.40.220 was prohibited by Article I, Section 10, Clause 2 of the United States Constitution and in particular that Clause 2 relating to imposts and duties is controlling of ad valorem general property tax statutes of a state to prohibit the assessment of taxes on goods irrevocably dedicated to a use inconsistent with importation, to-wit: general sale from the general mass of state property (though still in the original package) to the end that such assessment of tax is invalid.

3. Whether the assessment of the county general property tax on the taxpayer's goods, authorized and directed by Revised Code of Washington 84.36.005 and 84.40.220, was prohibited by Article I, Section 10, Clause 2 of the United States Constitution and in particular, the Supreme Court of the State of Washington has construed Clause 2 as applicable to state and county general property taxes to prohibit the taxation of respondent's property, whereas in fact Clause 2 relates only to imposts and duties, meaning excise taxes.

STATEMENT OF THE CASE

The respondent, Tricon, Inc., filed its action in the Superior Court of the State of Washington to obtain refund of the $1,564.88 tax paid under protest for the first half of 1961 and to enjoin appellant from collecting the second half and future taxes. This tax is the general property tax on the entire personal property inventory of respondent's local business.

The County Assessor had proceeded under Revised Code of Washington 84.36.005 and 84.40.220 to value the inventory as of January 1, 1960, by the average inventory method.

The tax was on steel goods imported by respondent from foreign countries, owned and held by respondent at various piers and warehouses for a short time until sold in the original package to respondent's customers. Respondent's main business is in California and distribution of the steel goods is made to respondent's customers as they may appear from Washington and elsewhere.

On cross-motions for summary judgment the trial court, on August 15, 1961, determined in effect facts:

> "WHEREAS, the steel goods upon which said tax was imposed were imported by plaintiff exclusively for the purpose of sale directly from foreign countries by ocean carrier and were on the date of said assessment owned and held for sale by plaintiff and temporarily stored in the original packages in which they were received from the ocean carriers awaiting sale and shipment to plaintiff's vendees, and none of the original packages in which the goods were received had been opened prior to such date or prior to delivery of the goods to common carriers for shipment to plaintiff's vendees. . . ."

The judgment of August 15, 1961 determined in effect that RCW 84.36.005 and 84.40.220 were invalid to the extent of the property of the respondent imported from foreign countries and still in their original packages because such statute was repugnant to Article I, Section 10, Clause 2 of the United States Constitution.

Directly speaking, the assessment was held invalid to the extent of the goods "imported and which remains in its original package."

Revised Code of Washington 84.36.005 and 84.40.220 are attached hereto as Appendix No. 1.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

(a) Local Quantity of Tax Involved Is Substantial

Respondent operates an established business and the general property tax will be of similar amount each year.

The County Assessor and Treasurer are the only persons making valuations and levies of tax for the state, county, municipalities and districts in the general property tax field in King County. The spread and purpose of the millage rate appears in Appendix No. 4. Other county, municipal and district tax revenue is miniscule. The state constitution prohibits income taxes. The state has pre-empted the excise tax field, such as for sales tax, motor vehicle fuel and use taxes.

The assessed value of goods in King County as of January 1, 1960, assessed by the average inventory method, taxed in the original package imported from a foreign country, excluding goods exempt by virtue of the local "transit" statute, was $2,500,000.00; of a fair market value of about $7,500,000.00.

The fair market value of similar goods in the State of Washington was $15,000,000.00.

Six cases are pending in the Superior Court and forty tax billings are being withheld from collection administratively awaiting the outcome of this case.

(b) The National Quantity of Tax Involved Is Substantial

Historically, counties have depended almost exclusively on the general property tax for revenue and support.

Although details may vary and a modicum of exemption is given by some states of goods in transit, primarily all states use the general property tax system of the kind here involved, although not all states presently tax personal property by the ad valorem general property tax method.

Some states impose the tax generally, as Washington: "All property . . . shall be subject to assessment and taxation" and leave to the courts to construe the scope of the act as in the instant case.

California requires: "All property in this state, *not exempt under the laws of the United States* or of this state, is subject to taxation under this code." West's Annotated California Codes, Revenue and Taxation, § 201.

Oregon requires: "All real property within this state and all tangible personal property situated within this state, *except as otherwise provided by law*, shall be subject to assessment and taxation in equal and ratable proportion." 2 Oregon Revised Statutes, § 307.030. The tax incidence date is 1:00 A.M. January 1, § 308.210.

Louisiana provides: "There is hereby levied for state purposes, annual taxes amounting in the aggregate to five and one-quarter mills on the dollar of the assessed value of all property within the state *except such as is especially exempted* from taxation by law.

. . ." Revised Statutes (1950) § 47:1701. The tax incidence date is January 1. § 47:1952.

Massachusetts requires: "All property real and personal, situated in the commonwealth, and all personal property of the inhabitants of the commonwealth wherever situated, *unless expressly exempt*, shall be subject to taxation." 2 Annotated Laws of Massachusetts Chapter 59, § 2. The tax incidence date is January 1.

(*Emphasis italics* supplied to foregoing sections of Constitutions.)

(c) The Constitution and Supreme Court Decisions

The questions presented are substantial insofar as the state court's use of the constitution and this court's decisions are concerned.

Article I, Section 10, Clause 2 reads:

> "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress."

To interpret this clause the Washington Supreme Court used *Brown v. Maryland,* 25 U.S. 266 (12 Wheaton 419) 6 L.ed. 678 (1827), and *Low v. Austin,* 80 U.S. 29 (13 Wallace 29) 20 L.ed. 517 (1871).

1. First and Second Questions—Statutes and Assessment Valid Because "Imports" Had Entered General Mass of State Property

Low v. Austin (1871), *supra*, may be squarely in point against King County, if the business of storage[1] by "commission merchant" there is the same as business of general sale here. We quote from p. 34 of the report:

> ". . . Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the State to levy any tax. If, at any point of time between the arrival of the goods in port and their breakage from the original cases, or sale by the importer, they become subject to State taxation, the extent and the character of the tax are mere matters of legislative discretion."

On the other hand, if the "commission merchant" in *Low v. Austin, supra*, was merely holding in storage the champagne assessed, as p. *12* of the record seems to indicate, then the 1871 opinion of this Court should be limited to facts of "mere storage" as in *Hooven, infra*, and be inapplicable to the instant case.

We urge that a substantial question of the scope of *Brown v. Maryland, supra*, as used by *Low v. Austin, supra*, and the Washington Supreme Court, has been raised by this Court's opinion in *Youngstown Sheet & Tube Co. v. Bowers*, and *United States Plywood Corp., v. City of Algoma, supra*, reported at 358 U.S. 534, 3 L.Ed.(2d) 490, 79 S.Ct. 383 (1958).

[1] Defendants in Error (Attorney General of California) claimed only "storage." Brief pp. 1 and 4.

In principle, *Youngstown* and *U.S. Plywood, supra,* are either inconsistent with the original package doctrine, or constitute a modification or clarification of the doctrine insofar as goods irrevocably committed to manufacturing are concerned. Such "inconsistency" had to be ignored, the Washington Supreme Court felt, until something was done about *Low v. Austin, supra,* "whatever may be our thoughts as to any fundamental inconsistency."

The gravamen of the 1958 cases appears in this Court's holding:

Although the goods remain in their original packages "these *manufacturers* have so acted upon the imported materials as to cause them to lose their distinctive character as 'imports' by irrevocably committing them, after their importation journeys have definitely ended, *to 'use in manufacturing'*." p. 543 (emphasis supplied).

In the instant case, the analogy we urge is simply to substitute "seller" and "to use of sale in a business," so that the rule would read: "These 'sellers' have so acted upon the imported materials as to cause them to lose their distinctive character as 'imports' by irrevocably committing them, after their journeys have definitely ended, to 'use of sale in a business.'"

This analogy was urged by Amici Curiae (Cravath, Swaine & Moore) in *Youngstown Sheet & Tube v. Bowers* and *United States Plywood v. Algoma, supra,* although from the opposite viewpoint, namely, that the holding of *Hooven & Allison Co. v. Evatt,* 324 U.S. 652 (1945), (Amici Curiae Brief page 7) had already announced a contrary rule by analogy.

But this Court in the 1958 opinions then specifically made clear that *Hooven* was a "mere storage" case (358 U.S. 534, 544). In the instant case we present for the first time, or at least since 1871, a factual situation of irrevocable commitment of "imports" to a general business of sale.

The analogy of inconsistency was predicted by Professor Thomas Reed Powell, 58 Harv. L.R. 858 (1945).

2. Third Question—Clause 2 Affects Excise Taxes Only, Not General Property Taxes

This question urges that the reliance given by the court on *Low v. Austin, supra,* was misplaced because *Brown v. Maryland, supra,* wherefrom the "original package doctrine" originated, concerned an excise tax. The facts are adequately characterized by Professor William W. Crosskey in his "Politics and the Constitution" (1953, University of Chicago Press), p. 311, *et seq.* as follows:

> "The case . . . was *Brown v. Maryland* [*supra*] . . . . It involved a license 'duty' of the state of Maryland, upon 'all importers of *foreign* articles or commodities' and, also, as the Court apparently interpreted the statute, upon 'importers' of American products. . . . Payment of the license duty of fifty dollars was made a necessary preliminary to the initial sale of the imports. . . . The act, in this application to first sales of imported goods in their original form or package, was held by the Supreme Court to be a violation of the Imports and Exports Clause and, also to be repugnant to the national 'impost' law enacted by Congress, which the Court interpreted as conferring a privilege of selling the imports it covered, upon payment of the impost

the act imposed. This second ground of the decision necessarily related to foreign imports only; for that was all the national impost act covered. But the Supreme Court said it supposed 'the principles' of its decision 'to apply to importations from a sister State'; and, also, *that it 'd[id] not mean to give any opinion on a tax discriminating between foreign and domestic articles.'* This last seems to indicate how the Court interpreted the Maryland act; and since only the first 'principle' of the decision was actually adequate, to an opinion of the kind the Court declared it 'mean[t] to give,' the conclusion seems inevitable that the invalidity of the Maryland tax in its interstate aspect rested solely on the Import and Exports Clause of the Constitution.

"In reaching these results, the Court . . . declared specifically that ' " 'a duty on imports [was] not merely a duty on importation, but [was] a duty on the thing imported.' " 'It [was] not . . , [if] taken in its literal sense, confined to a duty levied while the article [was] entering the country, but extend[ed] to a duty levied after it had entered the country.' This proposition was the actual basis of the Court's decision, since the tax before it was not one levied upon importation. Though remarks upon the limits of the protection afforded by the Constitution were, as the Chief Justice himself observed, 'premature' in the case, he nevertheless went on to make the suggestion . . . that, 'when the importer ha[d] *perhaps*, lost its distinctive character as an import, and [so] bec[o]me subject to the taxing power of the State.' This point, however, was not decided; but was carefully reserved for future decision, when the point should actually arise. So, all *Brown v. Maryland* settled, or was

intended to settle, was that a tax of the kind before the Court, which the Court regarded as one applying to interstate as well as foreign imports, was covered. . . ."

We offer the Court now the historical materials gathered by Professor Crosskey to Chapter X of his cited work (*i.e.*, Chapter 33, The Federalist) now to be offered as a legal definition of "imposts and duties" as contrasted with "general property taxes."

Although this view was advanced in *Low v. Austin, supra,* Professor Powell (58 Harv. L. R. 858, 866) points out that the argument was "literary" rather than "completely coercive" as a matter of historical legal definition.

This question was mentionad rather wistfully by the Wisconsin court in one short paragraph (*United States Plywood v. Algoma,* 2 Wisc.(2d) 567, 87 N.W.(2d) 481, 483), then apparently ignored by all counsel before this court.

CONCLUSION

For the foregoing reasons, the Supreme Court should take jurisdiction of this review.

DATED November 29, 1962.

Respectfully submitted,

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Deputy Prosecuting Attorney
for King County
Attorney for Appellants.

CHARLES O. CARROLL
Prosecuting Attorney,
King County
JAMES J. CAPLINGER
Chief Civil Deputy

APPENDIX 1

REVISED CODE OF WASHINGTON

§84.36.005 Property subject to taxation. All property now existing, or that is hereafter created or brought into this state, shall be subject to assessment and taxation for state, county, and other taxing district purposes, upon equalized valuations thereof, fixed with reference thereto on the first day of January at twelve o'clock meridian in each year, excepting such as is exempted from taxation by law.

§ 84.40.220 Merchant's personalty held for sale — Consignment from out of state — Nursery stock assessable as growing crops. Whoever owns, or has in his possession or subject to his control, any goods, merchandise, grain or produce of any kind, or other personal property within this state, with authority to sell the same, which has been purchased either in or out of this state, with a view to being sold at an advanced price or profit, or which has been consigned to him from any place out of this state for the purpose of being sold at any place within the state, shall be held to be a merchant, and when he is by this title required to make out and to deliver to the assessor a statement of his other personal property, he shall state the value of such property pertaining to his business as a merchant.

APPENDIX 2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

TRICON, INC., a corporation, *Plaintiff*,
vs.
KING COUNTY, a municipal corporation, *Defendant*.
No. 569955

ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND JUDGMENT FOR PLAINTIFF

This matter came on regularly for hearing before the undersigned Judge of the above-entitled court on July 27, 1961, upon motions of both the plaintiff and the defendant for summary judgment herein, each made on grounds that there was no genuine issue of fact raised by the pleadings. The plaintiff appeared through Evans, McLaren, Lane, Powell & Beeks and G. Keith Grim, their counsel of record; defendant appeared through Charles O. Carroll, Prosecuting Attorney, and William L. Paul, Jr., Deputy Prosecuting Attorney, its counsel of record. The Court considered the pleadings on file herein and the briefs submitted by plaintiff and defendant in support of their respective motions, and heard arguments of counsel; and

WHEREAS, defendant admitted plaintiff's allegations that plaintiff was engaged exclusively in importing from foreign countries steel goods to sell to purchasers in Washington and other states, that it engaged in no manufacturing or other business within the State of Washington and it never owned or sold any steel or other goods within the State which were not imported from foreign countries; and

WHEREAS, defendant admitted it imposed upon such steel goods, a general personal property tax assessed as of January 1, 1960 for the year 1961 in the total amount of $3,123.74, one-half of which, to-wit: $1,561.88, was paid by plaintiff under written protest April 18, 1961, on the ground that imposition of said tax violates and is repugnant to Article I, Section 10, Clause 2, of the Constitution of the United States and that imposition of said tax deprived plaintiff of property without due process of law in violation of Amendment 14 of the Constitution of the United States and of Article I, Section 3 of the Constitution of the State of Washington; and

WHEREAS, the steel goods upon which said tax was imposed were imported by plaintiff exclusively for the purpose of sale directly from foreign countries by ocean carrier and were on the date of said assessment owned and held for sale by plaintiff and temporarily stored in the original packages in which they were received from the ocean carriers awaiting sale and shipment to plaintiff's vendees, and none of the original packages in which the goods were received had been opened prior to such date or prior to delivery of the goods to common carriers for shipment to plaintiff's vendees; and

The Court being fully advised in the premises, now therefore IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The motion of plaintiff for summary judgment herein be and the same hereby is granted, and the motion of defendant for summary judgment herein be and the same hereby is denied.

2. The personal property tax collected by defendant from plaintiff was imposed as a general property tax solely to raise revenue for defendant and was not imposed for the purpose of executing any inspection or

police law of defendant or the State of Washington and said tax as assessed against the goods of plaintiff herein violates and is repugnant to Article I, Section 10, Clause 2 of the Constitution of the United States.

3. Plaintiff is hereby granted judgment against the defendant for the sum of $1,561.88, together with interest thereon at the rate of 6% per annum from April 18, 1961 until date of this judgment.

4. Plaintiff is hereby granted judgment against defendant and any of its officials, agents and employees enjoining it and them and each of them from collecting taxes assessed on or with respect to property imported from foreign countries by plaintiff for sale while remaining in the original package or form in which said property is imported and prior to sale thereof by plaintiff.

5. Plaintiff is hereby granted judgment against defendant for plaintiff's costs and disbursements herein to be taxed according to law.

DONE IN OPEN COURT this 15th day of August, 1961.

F. A. WALTERSKIRCHEN
Judge

APPENDIX 3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TRICON, INC., a corporation, *Respondent*, vs. KING COUNTY, a legal subdivision of the State of Washington, *Appellant*.	No. 36215 En Banc
F. L. HARTUNG GLASS COMPANY, INC., a Washington corporation, *Respondent*, vs. KING COUNTY, a legal subdivision of the State of Washington; A. J. "TONY" STEEN, as County Assessor of King County, Washington, and A. A. TREMPER, as County Treasurer of King County, Washington, *Appellants*.	No. 36267

As the above entitled cases present substantially identical issues on appeal, they have been consolidated for our review.

The plaintiff Tricon, Inc., brought suit in the Superior Court for King County to obtain a refund of an ad valorem tax assessed against certain personal property of the plaintiff and paid under protest. The plaintiff F. L. Hartung Glass Company, Inc., brought suit in the same court for injunctive relief to restrain the county assessor and treasurer from collecting an ad valorem tax assessed against certain property belonging to it. In both cases, judgment was awarded for the plaintiff.

The plaintiff Tricon, Inc., is engaged in the business

of importing from foreign countries various kinds of steel products. All of these steel products are imported for the sole purpose of resale to purchasers in Washington and in other states. The products, upon which the tax here involved was assessed and paid, were imported from foreign countries and remained, until sold and delivered to purchasers, in their original bundles, reels, crates or packages in which they were received upon entry to this country.

The plaintiff F. L. Hartung Glass Company, Inc., is engaged in the business of importing from foreign countries glass products for resale to purchasers within this state. The glass products, upon arrival at the company's place of business in Seattle, are stored in its warehouse in the original packages in which they arrive upon importation and remain there in that condition until sold to purchasers.

The basis for the judgments in the trial court in favor of the plaintiffs was the prohibition contained in the United States Constitution, Art. I, § 10, which provides:

> "....
>
> "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws . . . "

It has been the long-standing rule since the early cases of *Brown v. Maryland*, 25 U.S. 266 (12 Wheaton 419), 6 L.Ed. 678 (1827) and *Low v. Austin*, 80 U.S. 29 (13 Wallace 29), 20 L.Ed. 517 (1871), that goods imported from foreign countries for resale to purchasers in this country retain their character as imports while they remain in their original packages and until they are sold by the importer they are not subject to state taxation either in the form of a license tax upon the right

of the importer to sell or in the form of an ad valorem tax upon the property. See also *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 77 L.Ed. 710, 53 S.Ct. 373 (1933).

The defendant King County (appellant in both cases) contends, however, that two recent cases decided by the Supreme Court of the United States, *Youngstown Sheet & Tube Co. v. Bowers* and *United States Plywood Corp. v. City of Algoma*, decided together and reported in 358 U.S. 534, 3 L.Ed.(2d) 490, 79 S.Ct. 383 (1958), have sub silentio modified the rule of the *Brown* and *Low* cases to the extent that the taxes assessed in the instant cases are now not to be considered in violation of Art. I, § 10 of the United States Constitution and should be upheld as valid exercises of this state's taxing power.

In the *Youngstown Sheet & Tube Co.* case, the taxpayer imported iron ores for its own use in manufacturing and stored them in piles until needed in the manufacturing process. In the *United States Plywood Corp.* case, the taxpayer imported lumber and wood veneers for its own use in manufacturing and stored them in their original containers until they were ready for the manufacturing process. State ad valorem property taxes were levied upon the goods in each case. Upon review from state decisions upholding the constitutionality of the tax assessments, the United States Supreme Court affirmed the state courts and held that, although the goods were in their original containers, they had been committed to the use for which they were imported, i.e., the current inventory of the manufacturing process, and were, therefore, subject to state taxation.

The issue here involves the interpretation and application of the federal constitution and we are bound to follow the decisions of the Supreme Court of the United States, which have passed on this issue. *B. F.*

Goodrich Co. v. State, 38 Wn.(2d) 663, 231 P.(2d) 325, (1951). It remains, therefore, for this court to determine whether the rule of the *Brown* and *Low* cases, which the appellant concedes would otherwise control the disposition of the instant cases, has been modified. We are convinced, from our reading of the decision in the *Youngstown Sheet & Tube Co.* and *United States Plywood Corp.* cases, that the Supreme Court did not intend to change the rule applicable to the instant cases.

In *Brown v. Maryland, supra*, Chief Justice Marshall set forth the underlying principle which governs the question of state tax immunity for imports:

> " . . . when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State;"

The Chief Justice went on to say:

> "but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution."

As to when the thing imported has been "so acted upon," the court in the *Youngstown Sheet & Tube Co.* and *United States Plywood Corp.* cases, *supra*, specified some of the acts that would shed the tax immunity by recognizing, with approval, language in *Brown v. Maryland, supra*:

> " . . . the goods lose their character as imports when the importer (1) 'sells them,' or (2) '[breaks] up his packages, and [travels] with them as an itinerant pedlar.' . . . More important to the ques-

tion confronting us, he also held (3) that goods brought into this country by an importer 'for his own use' and here 'used' by him are to be regarded as a part of 'the common mass' of property and are not immune from state taxation. . . . "

It is apparent from a reading of the opinion, that the issue presented by the facts was limited to an application of the rule as stated in class (3) in the above quote. This is illustrated by the following passages from the court's opinion:

" . . . The constitutional design was then to immunize imports from taxation by the importing States, and all others through or into which they may pass, so long as they retain their distinctive character as imports. Hence, that design is not impinged by the taxation of materials that were imported for use in manufacturing after all phases of the important definitely have ended and the materials have been 'put to the use for which they [were] imported' (*Hooven & Allison Co. v. Evatt, supra* [324 U.S.], at 657), for in such a case they have lost their distinctive character as imports and are subject to taxation. . . .

" . . .

" . . . Whatever may be the significance of retaining in the 'original package' goods that have been so imported for sale (*Brown v. Maryland, supra; Waring v. The Mayor*, 8 Wall. 110, 122-123; *Low v. Austin*, 13 Wall. 29, 32-33; *Cook v. Pennsylvania*, 97 U.S. 566, 573; *May v. New Orleans*, 173 U.S. 496, 501, 507-508), goods that have been so imported for use in manufacturing are not exempt from taxation, though not removed from the 'original package,' if, as found here, they have been 'put to the use for which they [were] imported.' *Hooven & Allison Co. v. Evatt, supra,*

at 657. Breaking the original package is only one of the ways by which packaged goods that have been imported for use in manufacturing may lose their distinctive character as imports. Another way is by putting them to the use for which they [were] imported. . . ."

We do not think the Supreme Court has indicated by implication that goods imported for resale, and which remain in their original containers, lose their character as imports immune from state taxation when they become a part of the importer's current inventory of goods held for sale. See *Michle Printing Press & Mfg. Co. v. Department of Revenue*, 18 Ill.(2d) 445, 164 N.E.(2d) 1 (1960); *State ex rel. Morton Co. v. Board of Review*, 15 Wisc.(2d) ..., 112 N.W.(2d) 914 (1962). Whatever may be our thoughts as to any fundamental inconsistency in distinguishing between goods imported for one's own use which become a part of current inventory in the manufacturing process and goods imported for resale which become a part of the importer's current inventory in the selling process, we are bound, as heretofore stated, to accept the rationale of the decisions of the Supreme Court of the United States.

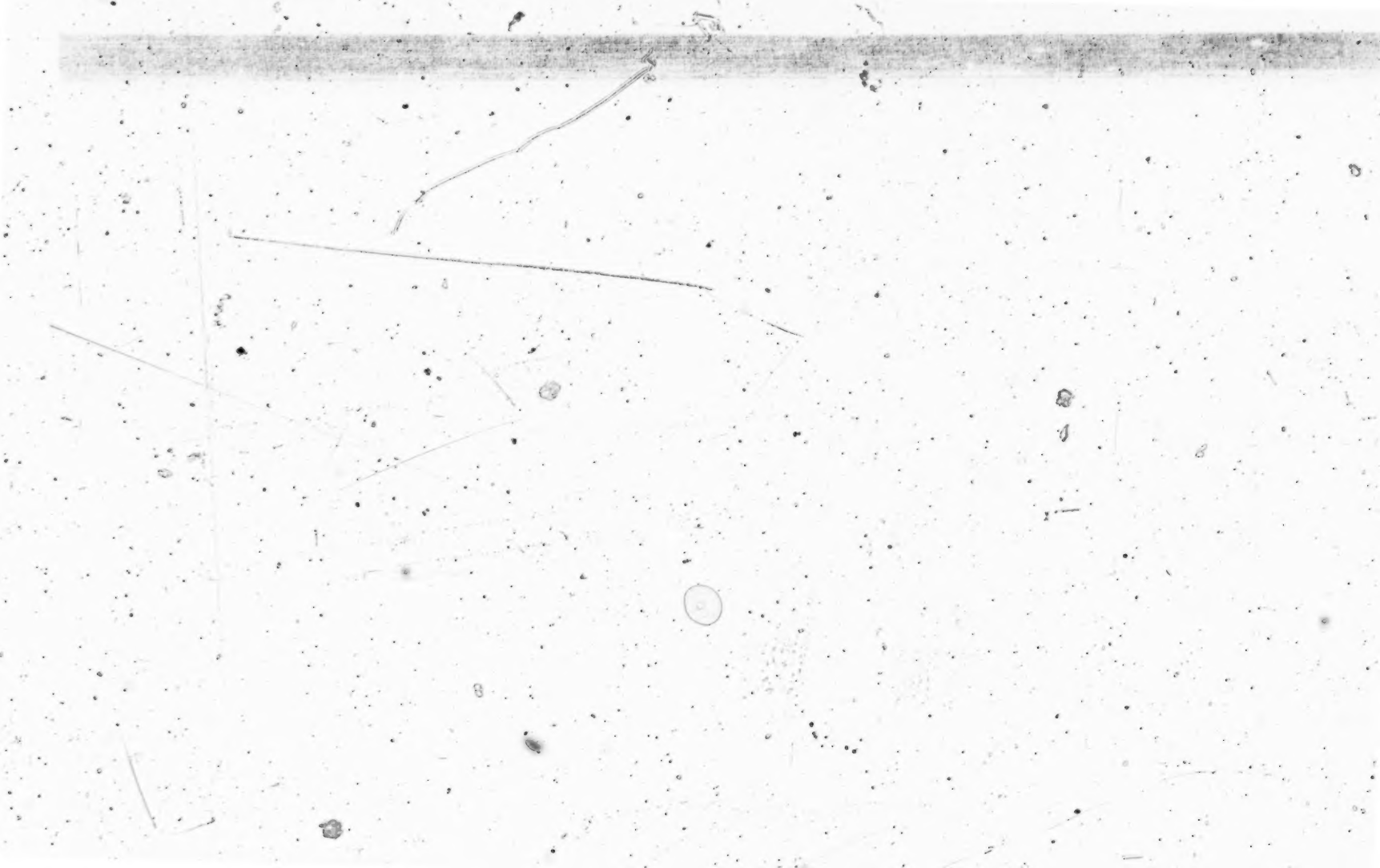
We, therefore, hold that the tax paid under protest by Tricon, Inc., and the tax assessed against F. L. Hartung Glass Company, Inc., are invalid because they were assessed in violation of Art. I, § 10 of the United States Constitution.

The judgments of the trial court are affirmed.

APPENDIX 4

KING COUNTY GENERAL PROPERTY TAX RATE, 1961

Name of Public Body and Purpose		*Mill Rate*
State of Washington (Public Assistance)		3.26
King County		
Cumulative Reserve	.62435	
Current Expense	5.68875	
Airport Bonds 1950	.04477	
Airport Bonds 1952	.03332	
Emergency Warrants	.13365	
Hospital and County Warehouse	.06566	
Inter-County River Improvement	.01048	
Public Health	.47918	
Soldier's Relief	.05704	
Flood Control	.26280	
Tuberculosis Hospital	.60000	
Bond Int. and Redemption	.44000	8.44
Seattle School District No. 1		29.30
Port of Seattle (District)		3.50
City of Seattle		20.00
To be collected by County Treasurer		64.50



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In the

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October Term 1962

No. 648

KING COUNTY, a legal subdivision of the State of Washington, *Petitioner*,

vs.

TRICON, INC., a corporation, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

Respondent believes the statute which sustains the jurisdiction of this Court is 28 USC Section 1257(3), not Section 1257(2) as urged by petitioner (Br. 2). Respondent also feels obligated to point out that the judgment of the Washington Supreme Court was entered September 17, 1962 as disclosed by its remittitur (R. 12a) rather than August 16, 1962 as stated by petitioner (Br. 2). See Revised Code of Washington 2.04.160 and 2.04.170 and Rule 15 of Rules Peculiar to the Business of the Washington Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

Petitioner asserts (Br. 2) that the validity of Sections 84.36.005 and 84.40.220, Revised Code of Washington are involved. This is not correct. The validity of

those sections of the Washington Code or of any other specific sections of the Washington Code was never raised by either party in the proceedings below, nor did either court below pass on the validity of those statutes. There is nothing in the record indicating that petitioner's assessor made the tax assessments here involved under the mentioned statutes, or that petitioner's treasurer levied the taxes in question under those particular statutes. The particular sections of the Revised Code of Washington alluded to by petitioner were in fact no more in dispute than were all the general property tax statutes of the State of Washington.

Respondent's complaint against the petitioner, so far as is material here, was simply that petitioner's collection of the general personal property tax from respondent with respect to the property involved "violates and is repugnant to Article I, Section 10, Clause 2 of the Constitution of the United States" (Complaint 3; R. 8).

Article I, Section 10, Clause 2 (the Import-Export Clause) of the Constitution of the United States in part provides:

> "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, . . ."

QUESTIONS PRESENTED

The single question presented is whether Article I, Section 10, Clause 2 of the United States Constitution prohibits a state from imposing a general ad valorem property tax upon goods which have been imported from foreign countries by the importer exclus-

ively for the purpose of sale to purchasers in the taxing state and other states while such goods remain unsold in their original packages in which they were carried into this country and while they are temporarily stored awaiting shipment via common carrier to the importer's vendees.

Respondent is dissatisfied with petitioner's statement of the questions (Br. 3-4). As pointed out above, no specific sections of the Washington Code were claimed to be violative of the Import-Export Clause, but, rather, the tax as imposed upon respondent's goods was claimed to violate that provision of the federal constitution.

Furthermore, there is no question as to goods "irrevocably dedicated to general sale" (Br. 3). That phrase has no place in this case, as there is nothing in the record to support this gratuitous characterization of respondent's goods. The goods simply were imported exclusively for the purpose of sale and were taxed while they were "owned and held for sale by (respondent) and temporarily stored in the original packages in which they were received from the ocean carriers awaiting sale and shipment to (respondent's) vendees, . . ." (Judgment 2; R. 3).

Petitioner's third paragraph under "Questions Presented" (Br. 4) raises a question of whether or not the Import-Export Clause applies only to excise taxes. This question was raised for the first time upon oral argument to the Washington Supreme Court. The question consequently was not timely raised below and cannot, therefore, be considered by this court on the petition for Writ of Certiorari. The question was not presented in

briefs of either party to the trial court or to the Washington Supreme Court. That court has followed a long standing rule of practice that questions not raised in any manner before the trial court will not be considered by it on appeal. *Johnson v. Seattle*, 50 Wn.2d 543, 313 P.2d 676 (1957); *Roehl v. Public Utility Dist. No. 1*, 43 Wn. 2d 414, 261 P.2d 92 (1953); and *North River Boom Co. v. Smith*, 15 Wash. 138, 45 Pac. 750 (1896). This rule applies with equal force to constitutional questions. *Unemployment Compensation Dept. v. Hunt*, 17 Wn.2d 228, 135 P.2d 89 (1943).

This court has stated on many occasions that it will not undertake to review what the court below did not decide. See e.g., *Walters v. St. Louis*, 347 U.S. 231, 333; 74 S.Ct. 505; 98 L.ed. 660, 664 (1954). More particularly this court will not consider questions which the highest state court is, by its settled practice, justified in disregarding, either because not assigned, or because not noticed or relied upon in the briefs or argument of counsel. *Pennsylvania R. Co. v. Illonois Brick Co.*, 297 U.S. 447, 80 L.ed. 796 (1936); *Hulvert v. Chicago*, 202 U.S. 275, 50 L.ed. 1026 (1906); *McGoldrick v. Compagnie Gen. Transatlantique*, 309 U.S. 430, 84 L.ed. 849 (1940).

STATEMENT OF THE CASE

The admitted facts (Answer; R. 5) are that petitioner assessed a general personal property tax of $3,123.76 upon steel goods owned by respondent having an assessed value of $48,430.00. One half, $1,561.88, of the claimed tax, was paid under protest. Suit for refund of the tax followed alleging, among other grounds, that

imposition of the tax violates and is repugnant to Article I, Section 10, Clause 2 of the Constitution of the United States (Complaint 3; R.8). The Trial Court awarded summary judgment to respondent (R.2-4) refunding the entire amount of tax. That judgment was affirmed on appeal by the Supreme Court of the State of Washington (R. 12, 12(a)).

Respondent was engaged in the State of Washington exclusively in the business of importing from foreign countries steel goods such as steel pipe, barbed wire and cable. It engaged in no manufacturing or other business within the State of Washington, and it had never owned or sold any goods within that state which were not imported from foreign countries. All of the goods which it imported were imported exclusively for the purpose of sale, and were sold by it to purchasers in Washington and other states.

The particular goods upon which the tax here involved was assessed and paid, consistent with the above described practices, were imported directly from foreign countries and arrived at piers in Seattle, Washington by ocean carrier. These goods remained in their original bundles, reels, crates and packages in which they were received while temporarily stored awaiting shipment to respondent's vendees. Upon rspondent's sale of these goods they were shipped by common carriers to the vendees in the original bundles, reels crates and packages in which the goods were carried by the ocean carriers. Respondent did not, nor did any other person, perform any service or act whatsoever on or with respect to the goods after their arrival by ocean carrier and before their shipment after sale to respond-

ent's vendees, and none of the bundles, reels, crates or packages in which these goods arrived was opened prior to delivery to the common carriers for shipment to respondent's vendees (Complaint 1, 2, 3; R.6, 7; Answer; R.5, Judgment 1, 2; R.3).

ARGUMENT

A. There is No Substantial Federal Question

The Washington court decided the case in accord with the applicable decisions of this court in *Brown v. Maryland,* 12 Wheat 419, 6 L.ed. 678 (1827), *Low v. Austin,* 13 Wall 29, 20 L.ed: 517 (1871); *Youngstown Sheet & Tube Co. v. Bowers* and *U.S. Plywood Corp. v. Algoma,* 358 U.S. 534, 3 L.ed. 2d 490, 79 S.Ct. 383 (1958).

Low v. Austin is squarely in point. The question in *Low* as stated by Justice Field was:

> "... whether imported merchandise, upon which the duties and charges at the custom-house have been paid, is subject to state taxation, whilst remaining in the original cases, unbroken and unsold, in the hands of the importer," 20 L.ed. at 518.

Those goods when taxed, as were the goods here in issue, were stored in their original packages in a warehouse where they remained for sale by the importer. The tax involved, as was the tax here, was a general ad valorem property tax.

Low relied upon *Brown v. Maryland* as controlling. In his opinion in *Brown,* Chief Justice Marshall said:

> "... It is sufficient for the present to say generally, that when the importer has so acted upon the thing imported that it has become incorpo-

> rated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import and has become subject to the taxing power of the state; but while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." 12 Wheat at 441, 442, 6 L.ed. 686.

In the *Youngstown* and *U.S. Plywood* cases, this court held that goods imported by a manufacturer lose their distinctive character as imports when they are used to supply the day-to-day manufacturing requirements of the manufacturer-importer although they have not been sold or removed from their original packages. It was there decided that by such use the manufacturer-importer had so acted upon the goods as to terminate their immunity within the principle established in *Brown*.

While *Youngstown* and *U.S. Plywood* narrowed the rule announced in *Brown* and followed in *Low* as it applies to a manufacturer-importer, those cases reaffirmed this court's adherence to *Brown*. At 358 U.S. 545, 3 L.ed. 2d 498, this court, with reference to the Import-Export Clause, said:

> ". . . The constitutional design was then to immunize imports from taxation by the importing States, and all others through or into which they may pass, so long as they retain their distinctive character as imports. Hence, that design is not impinged by the taxation of materials that were imported for use in manufacturing after all phases of the importation definitely have ended and the

materials have been 'put to the use for which they (were) imported' . . ."

In the instant case, respondent was engaged in no manufacturing or other activities in Washington. Its goods, rather, were imported only to be sold, and at the time they were taxed they were temporarily stored at the piers and warehouse waiting shipment to plaintiff's vendees in Washington and other states. At the time the tax was imposed, the goods not only retained their distinctive character as imports, but they were still in the actual flow of commerce which had started on foreign soil and was not to end until delivery was effected by common carrier to respondent's customers. Respondent had done none of the things which *Brown* held must occur before tax immunity ends, nor had it acted upon the goods in any manner, much less in a way held sufficient in *Youngstown*, to permit the tax.

Petitioner then is requesting this court to overrule *Brown v. Maryland* and *Low v. Austin* and to reverse its affirmance of those cases so recently announced in *Youngstown* and *U.S. Plywood*.

B. Matters Outside the Record

On page 6 and in Appendix 4 of the petition, extensive factual matters are presented which are not only irrevelant but are completely outside the record. Furthermore, petitioner has not referred to any source for this material and has thereby rendered it virtually impossible for respondent to even comment intelligently on the material. Certainly this court in determining whether to grant certiorari should not consider matters which are both outside the record and anonymous.

Whatever may be petitioner's purpose for including this anonymous material, it cannot claim it has become accustomed to any of the projected revenue mentioned or that its tax sources will be reduced because of the Washington Supreme Court's decision, for petitioner, consistent with *Brown v. Maryland*, has never collected taxes from imported goods situated as these were.

It is also fair for respondent to mention, since petitioner has projected its figures on assessments said to have been computed on the average inventory method (Br. 6), that this very method (see Revised Code of Washington 84.40.020) permits petitioner to exact its tax from such of respondent's imports which may ultimately be purchased any time during the tax year by vendees located within petitioner's jurisdiction. On the other hand, as to imports which are purchased by and shipped to vendees located outside of King County (the petitioner here), such imports have indeed simply passed through King County as a port of importation on the way to their ultimate destination. The exact purpose of the Import-Export Clause is, of course, to prohibit just such a port from taxing goods which are passing through it.

Petitioner's "Third Question" (Br. 11) was not raised in any manner before the Trial Court, as mentioned above, and so cannot be considered here. Even if the rule were otherwise it is a sufficient answer to this question here that the same question was raised and argued to this Court in *Low v. Austin*, 13 Wall. 29, L.ed. 517 at 518.

CONCLUSION

Petitioner requests this Court to review a judgment which rejected an *ad valorem* tax imposed on imported goods while they remained unopened before sale and while they had yet to be shipped to their purchasers. The taxpayer (respondent) engaged in no business other than importation of goods and it performed no act whatsoever with respect to the goods which, when they were ultimately sold, were not sold from the shelf or from displays but were shipped by common carrier to the purchasers both within and without the State of Washington.

The decision of the Court below, then, is in complete harmony with the applicable decisions of this Court, and the petition should therefore be denied.

Respectfully submitted,

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